

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Petition by the Colorado Public Utilities)	
Commission, Pursuant to 47 C.F.R.)	
§ 54.207(c), for Commission Agreement)	CC Docket No. 96-45
in Redefining the Service Area of)	
Delta County Tele-Comm, Inc.,)	
A Rural Telephone Company)	

**COMMENTS OF DELTA COUNTY TELE-COMM, INC.
AND THE COLORADO ASSOCIATION TELECOMMUNICATIONS**

DELTA COUNTY TELE-COMM, INC.
Margot Smiley Humphrey
Holland & Knight
2099 Pennsylvania Avenue
Suite 100
Washington, DC 20006
(202) 955-3000

COLORADO TELEPHONE ASSOCIATION
Barry Hjort
Executive Vice President
Colorado Telecommunications Association
PO Box 300
Littleton, CO 80160
(303) 795-8080

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Comments of Delta County Tele-Comm, Inc.

CC Docket No. 96-45

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Association

Delta County Tele-Comm, Inc., (Delta), by its attorneys and joined by the Colorado Telecommunications Association (CTA), submits these comments in response to the Petition by the Public Utilities Commission of the State of Colorado [("CPUC")] to Redefine the Service Area of Delta County Tele-Comm, Inc, Pursuant to 47 CFR 54.207(c (Petition). Delta is a "rural telephone company" (rural carrier) under the Telecommunications Act of 1996.¹ For this defined rural carrier category, Congress enacted specified public interest exceptions to the general national policy of authorizing, endorsing and even "jump starting" competition among local exchange service providers.² The resulting statutory safeguards enable Delta to provide universal services throughout its 1,540-square-mile study area for 10,622 access lines, despite the low density and consequent high costs of service.

¹ Like the other 1996 amendments, this definition has been codified in Title 47 of the United States Code, 47 USC § 154(37). Citations herein will be to the codified statutory sections.

² A company within the rural telephone company definition, based on low density or small size, is exempt (unless a competitor makes a sufficient termination showing) from the pro-competition network opening mandates that apply to other incumbents, 47 USC 251(f), and may obtain infrastructure sharing from carriers with greater economies of scale, 47 USC § 259. Statutory preconditions must be met before another carrier may qualify for support in its service area and before statutory designation area can be changed from its study area. And, finally, a state may even require a competitive entrant in a rural carrier's area to qualify as an Eligible Telecommunications Carrier, 47 USC § 253(f).

I. BACKGROUND AND SUMMARY

In its August 9, 2002 Petition, the CPUC seeks this Commission's agreement under federal law and regulations³ to "disaggregate" Delta's study area into six service areas at the wire center level. The CPUC seeks assent to carve up Delta's study area under a state rule requiring redefinition of a rural carrier's service area for determining support eligibility and carrier obligations to match the support calculation levels used to disaggregate its universal service support under a new FCC rule.⁴ Delta filed a plan partially deaveraging its \$16.92 per line study area support by calculating relative support for each wire center, ranging from \$11.36 to \$47.22 per line. Its support disaggregation triggered the CPUC rule's automatic service area matching rule and the CPUC's petition.

The CPUC adopted its rule to make federal universal support available to competing carriers that desire Eligible Telecommunications Carrier (ETC) status, without requiring them to provide universal service throughout the rural carrier's study area pursuant to §214(e).⁵ The CPUC's rationale for its rule was that (a) providing support for smaller areas would be "competitively neutral,"⁶ (b) disaggregating support eliminates problems such as cherry picking⁷ and (c) specific wireless carriers had requested designation and would compete if they could get

³ 47 USC §214(e) and 47 CFR §54.207.

⁴ 47 CFR §54.315.

⁵ See Rules and decisions attached to the CPUC's August 2, 2002: *Petition by the Colorado Public Utilities Commission Pursuant to 47 CFR §54.201(C) for Commission Agreement in Redefining the Service Area of the Service Area of Delta County Tele-Comm, Inc., a Rural Telephone Company* (CPUC Petition or Petition), Attachment 2 (CPUC Rules): .Ruling on Exceptions and Order Vacating Stay, CPUC Petition, Attachment 3, p. 14 (Ruling);.

⁵ Ruling at 3. Oddly, the CPUC said that its rules were "necessary to ensure that [ETCs] continue to receive support under the federal universal service program," CPUC Rules at 2, and adopted them "in order to make [its rules] ... consistent with the new FCC rules," Ruling at 3.

⁶ The Ruling (p. 14) said that support targeting and service area disaggregation "go hand-in-hand" and, once support is disaggregated, "it would be anti-competitive to defer the redefinition of service areas" to hold a hearing, especially since would-be ETCs were unable to serve some areas").

⁷ Ruling at 15 ("the interests of competitive neutrality require consistency between the methods for disaggregating high cost support and the methods for disaggregating service areas").

support without having to serve entire rural carrier study areas.⁸ Although no such carrier has applied to serve in Delta's area, the CPUC nevertheless petitioned to fragment its study area to help and encourage competitors to enter by making support available.⁹

The CPUC's plan is inconsistent with the Act. The Commission adopted three paths for rural carriers to disaggregate their total study area support into zones reflecting (to some extent) the significant disparities in the cost of serving various geographic segments. On reconsideration of its disaggregation decision, this Commission expressly held that adopting a rule requiring service area partitioning would improperly prejudge the redefinition issues left for joint state and federal evaluation. In contrast, the CPUC is seeking a Commission rubber stamp for its prejudgment that dismantling a rural carrier's study area into multiple "service areas" that match the level of its support disaggregation would aid competitors in entering.

Since Delta allocated its study area support to reflect relative costs at the wire center level, the CPUC plans to carve its study area into six wire-center-based service areas. With no ETC designation request to consider, it lacks the facts it needs to evaluate the effects of the change on Delta, its customers, the cost-effectiveness of supporting multiple supported competitors and the incentives and ability to evolve rural network capabilities. The CPUC's purpose is to ensure that competing carriers will qualify as ETCs to receive federal support funded by interstate customers by greatly reducing the geographic area and customers each additional supported carrier must currently serve to draw federal support. In its fervor for

⁸ Ruling on Exceptions and Order Vacating Stay, CPUC Petition, Attachment 3, p. 3 (Ruling) (support disaggregation leaves "no reason [such as cream-skimming] to prevent Western Wireless and NECC from competing in rural areas they were seeking to serve."

⁹ Delta's six wire centers are contiguous, so using its study area for support, obligations and eligibility does not even require discussion of that issue.

bringing in competitors, the CPUC has not weighed the costs against the likelihood of actual consumer benefits.

However, Congress deliberately excluded additional designations for rural carrier study areas from the statute's general pro-competition requirement for states to designate additional carriers in non-rural areas to draw federal support. It chose to impose higher hurdles for new ETCs by preconditioning designation on a state public interest determination and prescribing rural carriers' entire study areas as the geographic service area a competitor must serve to qualify for support, absent state and federal agreement. Owing to the rural carriers' thin markets, small customer bases and limited economies of scale, it cannot be assumed that the customer benefits of adding more federally supported carriers will exceed the costs. But, in spite of the statutory exception from mandated support for competitors in rural areas and without analysis of the impacts, the CPUC simply argues that carving out wire-center-based service areas will foster competitors' entry, achieve "competitive neutrality" (because competitors cannot now qualify for the rural carrier's per line support). It also erroneously deems support disaggregation to be a panacea for cream skimming and other adverse effects. The CPUC's "more competition at any cost" rationale, the opposite of the statutory premise for rural areas, fails to show how additional supported carriers will provide net benefits to consumers when they have few obligations and would only serve chosen portions of the study area. The Commission should reject the presumption underlying the CPUC rule: that Congress was wrong because duplicative support for far-from-universal service is theoretically good for consumers and a sound use of funding provided by the nation's interstate ratepayers.

The CPUC rule also fails to take into account relevant Joint Board recommendations and this Commission's rules. The RTF/Joint Board recommendations to "consider" disaggregation in

connection with additional ETC designations must be read together with (a) their recommendation to keep measuring total support at the study area level and (b) the provision in this Commission's rules that the term "service area" defines "the overall area for which the carrier shall receive support from federal universal service support mechanisms." Unless it changes or waives the overall support area, which would alter the level of support available, this Commission cannot agree to carve wire center service areas out of Delta's study area under its own rule.

Disaggregating support fails to resolve the concerns that led the original Joint Board to maintain study areas as rural carriers' service areas. Partial deaveraging of support leaves unsolved an even larger problem of cream skimming and arbitrage because averaged study area access and local costs and rates have not been "disaggregated." The Petition does not even attempt to explain why this Commission should now ignore the Congressional concern demonstrated by the different competitive role prescribed for rural carriers under this and other statutory provisions. The Act's tools for achieving universal service are as essential for Delta today as when Congress enacted them.

Above all, the CPUC request to rubber stamp a rule that gives additional ETCs support to simulate competition in a market too thin to sustain one area-wide provider without support flies in the face of both (a) the Chairman's commitment to reexamining the Commission's earlier policy of treating competitors preferentially and creating unrealistic expectations and dependence and (b) Commissioner Martin's criticism of the entire concept of using support to "create competition." The Commission has agreed that there are public interest and consumer impacts that must be considered before adding supported ETCs in rural areas, such as the fate of customers if the rural carrier withdraws as the carrier of last resort, as the ETC provisions permit,

and whether current support levels for competitors are appropriate. The Commission should deny the petition, which is flawed and lacks the facts for the necessary case-by-case review of ETC requests in Delta's study area (if there were any request to evaluate). The best course would be to include in the upcoming comprehensive "portability" rulemaking the fundamental questions about how ETC designations, support measures, responsibilities and the judicially-required state role in providing support will fit into the new regulatory approach. With the fund ballooning out of control as ETC requests multiply, without significant measurable benefits for the rural areas or the nationwide consumers that pay the tab, it is high time for this Commission to reevaluate this whole area.

These comments will show that the CPUC's reasons for dividing Delta's study area into six service areas at the wire center level do not justify Commission concurrence because: they rest on unsupported assumptions that Congress's rural area eligibility requirements are unwise, rather than reasons for changing them; they do not comport with Joint Board recommendations and this Commission's rules and decisions; they prejudice or ignore significant public interest questions that must be evaluated case-by-case; and they raise additional issues that should be determined in the Commission's upcoming comprehensive portability proceeding. The Commission should deny the Petition and consider service area definition issues in its portability proceeding.

II. THE PETITION RESTS ON UNSUPPORTED ASSUMPTIONS THAT CONGRESS'S RURAL AREA ELIGIBILITY REQUIREMENTS ARE UNWISE, RATHER THAN REASONS FOR CHANGING THEM

The Commission's consideration of whether to concur in a state proposal to disaggregate a rural carrier's service area to provide support for providing supported services to a significantly reduced geographic universal service area must be grounded in the statute. The statute

deliberately buffers the Act's pro-competition policy for rural carriers to ensure that the national universal service policy will not be thwarted by forcing supported competition prematurely into thin rural markets.

A. An ETC Designation Area Smaller than a Rural Carrier's Study Area Must Comport with Section 214(e) and this Commission's Rules

In non-rural carriers' areas, paragraphs (1) and (2) of Section 214(e) apply the Act's general pro-competition policy: They require state designation of one or more ETCs, as long as each offers and advertises the federally-defined universal services "throughout the service area ... designated by the State commission." In sharp contrast, Congress (a) only permits support "for more than one carrier ... for a service area designated by the State" in a rural carrier's service area if the state makes an affirmative public interest finding (*ibid.*). It even conditions the state's authority to designate the "service area" throughout which universal service must be provided to obtain support by defining the service area for §214(e)(1) and (2) purposes in a rural carrier's area in 214(e)(5) as

such company's 'study area' unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.

This Commission's rule provides that the term "service area" means a "geographic area established by a state commission for the purpose of determining universal service obligations and support mechanism," that "defines the overall area for which the carrier shall receive support from federal universal service support mechanisms."¹⁰ The rule also prescribes procedures for the required joint decision to change a rural carrier's service area.¹¹

¹⁰ 47 CFR §54.207(a).

¹¹ See 47 C.F.R. § 54.207(c). Specifically, section 54.207(c)(1) provides that such a petition shall contain: (i) the definition proposed by the state commission; and (ii) the state commission's ruling or other official statement

The CPUC seeks to "redefine" Delta's study area into the six individual wire centers that make up Delta's current, frozen study area. It argues (pp. 1-3) that, owing to Delta's large, geographically and topographically diverse study area, "potential new entrants will find it burdensome to serve the entirety of Delta's expansive service area," as the law requires. Thus, it contends, wire-center-based service areas based on Delta's disaggregation plan will "promote competition in Delta's service area."

B. The Statutory Requirements for Additional Designations in Rural Carrier Areas Are a Deliberately Non-Neutral Exception to the General National Preference for Competition

By assuming that more competition justifies partitioning Delta's study area to help competitors enter and ensure competitive neutrality, the CPUC has missed the entire point of the statutory rural requirements. The requirement to provide service throughout "the entirety" of an "expansive," diverse, difficult and high-cost service area, as §214(e) provides, is what the typical rural carrier, including Delta, faces. Customers throughout the Delta service area benefit from federal support provided to Delta to carry out its commitment to area-wide service at just and reasonable rates. The difficulty and costs of assuming that obligation that deter competitors are also precisely why Congress required careful state evaluation and a public interest determination before authorizing support for competitors in rural carrier areas. Recognition that rural consumers may not benefit from fragmenting cost and support recovery from their thin markets is also why Congress added a further layer of review beyond the state commissions as the prerequisite for any change in the mandate to offer supported services "throughout the area

presenting the state commission's reason for adopting its proposed definition, including an analysis that takes into account the recommendations of any Federal-State Joint Board convened to provide recommendations with respect to the definition of a service area served by a rural telephone company. *See also Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776, 8881, para. 188 (1997) (*Universal Service Order*) (subseq. history omitted).

designated by the State." Congress prescribed each rural carrier's "service area" as its "study area ...unless and until" both state and federal regulators agree to a change.

The CPUC's arguments for elimination of the requirement to serve throughout a rural carrier's service area solely to help competitors boil down to an argument against the statute itself. Congress would obviously simply have made added designations mandatory in rural as well as non-rural areas had it intended competition and competitive neutrality to govern rural designations. Thus, the extra hurdles to adding more carriers eligible for support in rural carriers' areas can have no other purpose than to "impact the ease with which competition can enter rural areas" (Petition, p. 4). Furthermore, the study-area-wide service area mandate is at the heart of the purpose for supporting universal service in the first place – ensuring service and reasonable charges to areas that marketplace choices alone do not serve.¹² The CPUC has assumed away the statutory requirements; it has not shown why they should not continue to apply as enacted.¹³

Regardless of the CPUC's reasoning and desire to simulate competition via federal support for competitors, moreover, this Commission's Chairman has explained the need and his commitment to move beyond "past policies" to a less paternalistic role:

Times have changed and policies must change. In implementing the 1996 Act, previous Commissions were faced with a different context—the market was booming. ... The promise of a new paradigm that abandoned the natural monopoly thesis and saw a promised land of infinite competitors was fully embraced. ... Government policy was to create a competitive industry to compete

¹² It is common for Congress to require carriers to face "daunting... tasks[s]" (*see*, Petition at 4) in return for federal support. For example, Rural Utilities Service and Rural Telephone Bank borrowers face the daunting statutory task of making the financed telephone service or improvements "available to the widest practical number of rural users," 7 USC § 922, as a condition under federal financing programs.

¹³ For the same reasons, CPUC's arguments that retaining a rural carrier's study areas as the service area for which area-wide provision of supported services is mandatory is a "significant barrier to entry" and that "competitors cannot receive the kind of universal service support now being received by Delta" (Petition, p. 4-5) are simply yet more ways to criticize what Congress enacted as the additional designation prerequisites in §214(e). Such characterizations are not, therefore, even a first step in justifying changing the statutory prerequisites.

in the local telecommunications market. And it did. Government policy was to provide extraordinary advantages to competitive entrants in order to bring competition into being rapidly. And it did. Government policy also explicitly and implicitly signaled that it would protect these new entrants from failure. No matter how ... poor business models were, policy promised that all competitors could be ... sustained in the name of competition. It is here where the government's pro-competitor industrial policy cracked. It could not possibly protect against [various competitors'] shortcomings.¹⁴

The Chairman was not specifically speaking of universal service support, but the same concerns about creating unrealistic expectations and faulty entry incentives apply. Paternalistic policies favoring additional state designations have begun to balloon federal support obligations without regard to whether the costs are justified by likely benefits;¹⁵ some carriers' business plans seem to rest on perpetually obtaining support without significant obligations;¹⁶ and contributors increasingly fear the growing federal fund will become unsustainable. These post-1996 Act developments raise the same need the Chairman has flagged for a more responsible role for this Commission and the states in performing their duties to safeguard rural consumers. They must act as Congress's gatekeepers for rural designations and the scope and cost of supported entry.

III. THE PETITION DOES NOT COMPORT WITH JOINT BOARD RECOMMENDATIONS OR THIS COMMISSION'S RULES AND DECISIONS

A. The CPUC's Rule and Request Are Not Consistent with the Service Area Designation Rule

The Petition avers (pp. 5-6 and n. 4) that the Colorado rule automatically matching designation service areas with a carrier's disaggregation level (a) was adopted "partly in

¹⁴ Speech by Michael K. Powell at the Goldman Sachs Communicopia XI Conference, New York, NY (October 2, 2002), pp.3-4.

¹⁵ See, e.g., National Telecommunications Cooperative Association Petition for Expedited Rulemaking, filed July 26, 2002.

¹⁶ See, e.g., Reply Comments of Western Wireless Corporation, pp. 6-12, filed January 8, 2001 in *Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling That the*

response" to this Commission's decision adopting the Rural Task Force and Joint Board recommendations on support disaggregation¹⁷ and that its rule for partitioning into matching service areas for designation and ETC area-wide service obligations follows §54.207.¹⁸ However, the automatic partitioning rule is not responsive to the RTF and Joint Board recommendation or the cited service area definition rule.

As noted earlier, §54.207(a), which applies to both incumbents and competitors,¹⁹ provides that "service area" is a "geographic area established by a state commission for the purpose of determining universal service obligations and support mechanisms" and that "defines the overall area for which the carrier shall receive support from federal universal service support mechanisms." Under Path 3 support disaggregation, now applicable to Delta, "[s]upport available to the carrier's study area under its disaggregation plan shall equal the total support available to the study area without disaggregation."²⁰ In other words, regardless of support disaggregation, Delta's "service area" remains its "study area" under §54.207(a) and Path 3

Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service, WT Docket No. 00-239.

¹⁷ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, FCC 00J-4 (Jt. Bd., 2000) (Joint Board Recommendation), Appendix A (RTF Recommendation). As noted earlier, on review of its own rule, the CPUC asserted that it was changing its designation requirements "in order to make them consistent with the new FCC rules."

¹⁸ 47 CFR §54.207(a).

¹⁹ 47 CFR §54.207(a). Moreover, §214(e) makes it clear that the same "service area" is involved for designation, service obligations and support for the incumbent and a newcomer. The provisions set the prerequisites for "designat[ing] more than one common carrier ... for a service area designated by the State commission ...," §214(e)(2) (emphasis added), and specify that

In the case of an area served by a rural telephone company, 'service area' means such company's 'study area' unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.

§214(e)(5) (emphasis added). The plain language of the statute thus establishes that the service area for universal service purposes can only be changed for the "rural telephone company" and that authority for a state to designate "more than one" ETC in that rural carrier's service area means for the same "service area" as the rural carrier.

because the study area remains "the overall area for which [Delta] ... receives support from federal universal service support mechanisms" pursuant to the RTF and Joint Board recommendation and Commission rules.

The Commission's Public Notice reports that the CPUC seeks to "define Delta's service area as an area different from its study area for the purpose of determining federal universal service obligations and support mechanisms ... [and] to designate each individual wire center of Delta as a separate service area.." ²¹ However, §54.207(a) prevents adoption of service areas below Delta's study area level as long as that level is used to measure total support. Thus, a change in Delta's service area would require this Commission to change or waive the rule so as to calculate support for each new service area separately and without regard to total support measured at the study area level. The bottom line is that the Petition could only be granted if it requested and stated a sufficient basis for a change to determine total support for Delta and other rural carriers at each individual wire center. The Petition does not request, much less justify, such controversial and unexamined changes or waivers. Thus, the CPUC's Petition should be dismissed, leaving Delta's study area as the "service area" for all universal service purposes.

B. The CPUC's Rule and Request Are Not Consistent with Joint Board Recommendations

Section 214(e)(2) provides for designation of "more than one" or an "additional" ETC in the same rural carrier service area only upon state and federal agreement, after taking into account a §410(c) Joint Board's recommendation. The Petition states (n. 4) that the CPUC has considered the RTF-Joint Board recommendation (and the resulting Commission decision); but

²⁰ 47 CFR §54.315(e)(1). This study area measure was recommended by the RTF and Joint Board and adopted by the Commission.

²¹ Public Notice, The Colorado Public Utilities Commission Petitions To Redefine The Service Area Of Delta County Tele-Comm, Inc. In The State Of Colorado, DA 02-2383, CC Docket No. 96-45, p.1 (Sept. 25, 2002).

the record does not bear out this statement. The Joint Board and RTF disaggregation discussion stopped far short of recommending an automatic change to match a rural carriers' service areas to that carrier's relative-cost-based support disaggregation plan. The RTF's remark on service areas for rural carriers adopted by the Joint Board started by recognizing that the designation and service area decisions implicated in a service area recommendation are under state and joint state and federal authority. The RTF then rather mildly suggested that "the level of disaggregation of support be considered in determining whether to certify new ETCs for a service area other than a full Rural Carrier ETC study area." This suggestion and the reference to the state designation role are only consistent with "considering" this question as a component of the public interest determination the state must make before certifying additional new ETCs in a rural carrier's area. Yet the CPUC has not "considered" the effects of the service area redefinition on the public interest in any meaningful way.

The Joint Board recommendation, the resulting disaggregation rules, the existing service area rule and the statutory provisions are all at odds with the automatic service area redefinition rule and the CPUC's wire center partitioning proposal.

C. Support Disaggregation Alone Does Not Eliminate the Concerns the Initial Joint Board Recommendation Identified in Refusing to Endorse Carving Rural Study Areas into Smaller Service Areas

As the Petition admits (pp.8-9), the initial Joint Board rejected smaller rural carrier designation service areas. Its concerns about cream skimming were allayed when competitors, "as a condition of eligibility" to receive support, were required to serve the rural carrier's entire study area. It paid attention to the protections in the Act, which "[i]n many respects places rural telephone companies on a different competitive footing with other local exchange companies."

Finally, it kept the study area definition in effect because of the administrative difficulties for rural carriers in calculating costs below the study area level.²²

The statutory exceptions from competitive provisions discussed by Joint Board for rural carriers remain in effect.²³ The impacts on competition in light of the circumstances in each rural area must be part of the public interest inquiry in deciding designation issues, including analysis of how service area size affects incentives to evolve rural network capabilities. The Petition's reliance on adding competition and giving support to added carriers is the opposite of factual analysis showing why the statute's study area definition of service area should be changed.

The CPUC asserts that support disaggregation solves the cream-skimming, arbitrage and administrative problems that led the Joint Board to preserve rural carrier study areas as their designation service areas. But, support disaggregation leaves local and access rates averaged throughout the study area, continuing incentives for cream-skimming and arbitrage on a larger scale than aggregated support. Indeed, the aggregation of embedded costs and rates at the study area level, which applies to all of the carriers costs, not just support costs, raises concerns about averaged interstate access and local rates identical to the former support-averaging concerns. Perverse market signals from averaging led the Joint Board to maintain service areas to match the aggregation levels for rural carriers' using embedded costs. The Joint Board explained:

Another reason to retain existing study areas is that it is consistent with our recommendation that the determination of the costs of providing universal service by a rural telephone company should be based, at least initially, on that company's embedded costs. Rural telephone companies currently determine such costs at the study-area level. We conclude,

²² The Petition cites the original Joint Board's recommendation, *Federal-State Joint Board on Universal Service, Recommended Decision*, CC Docket No. 96-45, 12 FCC Rcd 87, 179-80, paras. 172-74 (1996) (First Recommended Decision).

²³ *Id.*, at para. 173.

therefore, that it is reasonable to adopt the current study areas as the service areas for rural telephone companies rather than impose the administrative burden of requiring rural telephone companies to determine embedded costs on a basis other than study areas.²⁴

Only deaveraging access and local costs and charges to the service area level, a change that raises serious public interest and universal service issues that go far beyond the scope of the CPUC's rule and request, would even begin to address the statutory study area rationale accurately stated and followed by the original Joint Board:

Potential “cream skimming” is minimized because competitors, as a condition of eligibility, must provide services throughout the rural telephone company’s study area. Competitors would thus not be eligible for universal service support if they sought to serve only the lowest cost portions of a rural telephone company’s study area.²⁵

Rural carriers will use embedded costs and calculate their costs at the study area for at least the remainder of the five-year RTF plan. Thus cost differences, cream skimming and arbitrage incentives survive and exceed support deaveraging relief within Delta's study area. Moreover, as an incumbent, Delta retains study area-wide costs for carrier-of-last-resort obligations and other obligations, such as CALEA, that an additional ETC does not bear.

The Petition has not answered the many statutory and practical differences identified by the original Joint Board. Indeed, the statute and the regulatory history demonstrate that Congress was wise to provide safeguards for rural carrier areas because the general rule of supporting any and all additional carriers patently stacks the competitive deck against the incumbent. And beyond that, rural carrier’s areas have been singled out for deeper review because thin population and large study areas mean that many consumers are not profitable for any carrier to serve. Splitting such a market between two or an unlimited number of supported carriers is inconsistent

²⁴ *Id.*, at para. 174.

²⁵ *Id.*, at para. 172.

with consumer interests. New competitors drawn into thin markets by the incentive to obtain support with almost no obligations, for example, will make it increasingly risky and inefficient to deploy today's and tomorrow's network advances throughout Delta's study areas.

D. Commission Decisions Are Also Inconsistent with an Automatic Service Area Redefinition Rule

This Commission expressly refused, in reconsidering disaggregation, to mandate automatic service area partitioning to match support disaggregation levels in its rules. The decision rejected a party's demand that "whenever a rural incumbent carrier study area is disaggregated for purposes of targeting funding, the study area should automatically be disaggregated for purposes of ETC designation as well." The statute, the Commission held, requires a joint state and federal determination that precludes this Commission from prejudging the issue by adopting a rule. The CPUC rule here has the same effect of prejudging questions across-the-board in advance that the statute left for particular determinations pursuant §214(e)(5). Since the Rural Task Force, the Joint Board and this Commission only recommended that states "consider" the results of disaggregation "in determining whether to certify new eligible telecommunication carriers for a service area other than a rural carrier's entire study area," neither the state nor this Commission can lawfully bind its hands in advance of the designation and certification process and the findings required by §214(e).

This Commission has also held that the areas used for calculating support and the service areas for designation and receiving support do not need to match. In its initial universal service decision under the 1996 Act, the Commission used study areas to calculate the level of high cost support that rural carriers receive based on actual costs, but held that the level of support calculations need not be the same as the designated service area to comply with 214(e), "so long as a carrier does not receive support for customers located outside the service area for which a

carrier has been designated eligible by a state commission." This principle is now codified in §254.207(a)'s provision that the designated service area "defines the overall area for which the carrier shall receive support from federal universal service support mechanisms."

As the Petition concedes (p. 8), the original Joint Board named to implement §254 "recommended that rural service areas remain the study areas of those companies," though it "implied" that changed circumstances might justify a change. Contrary to the Petition's contentions, though, support disaggregation does not amount to sufficiently changed circumstances to solve the cream skimming and arbitrage problems that led to keeping a rural carrier's service area as its study area.

IV. THE PETITION PREJUDGES OR IGNORES SIGNIFICANT PUBLIC INTEREST QUESTIONS THAT MUST BE EVALUATED CASE-BY-CASE

A. Service Area Redefinition for Designation Purposes Is One of Many Components of the Public Interest Determination that a State Must Make Before Designating More than One Carrier to Receive Support in a Rural Carrier's Area

A central role of this Commission and the states in making determinations that provide support in rural areas by spending federal support money ultimately collected from interstate ratepayers is to ensure that the benefits to rural and nationwide consumers justify the costs. In rural areas, Congress legislated safeguards because the costs could well outweigh the benefits of supporting more competitors. Accordingly, the Commission needs to consider the impacts of changing the service area that a new carrier must serve and the impacts of dividing the market on the rural carrier and rural consumers. Particular facts about individual service areas and designation requests are essential to cost-benefit analysis and the public interest balance. That is impossible in Delta's case, as no carrier has stepped forward to request support in its area.

"Costs" of further designations also include the effects of supporting additional carriers that are not limited in number, what support they may draw or how they may configure their entry to maximize their profits. There is an inherent problem with a system that lets states control what new demands are placed on the federal support mechanism, with minimal if any federal supervision. However, enforcing the state support obligations imposed by §254(f) may provide a check on this opportunity for abuse.²⁶ The Tenth Circuit has instructed this Commission to take proper steps to induce states to meet their share of the support burden for high cost areas.²⁷ To begin with, one part of the service area and overall public interest evaluation should be a state determination under §254(f) that it has sufficient mechanisms to fulfill its own statutory support duty.

Each area will present different questions and facts. The Commission is aware that the answer is neither simple nor automatic:

Although we recognize the substantial benefits of competition to consumers, we acknowledge that Congress expressed a specific intent to preserve and advance universal service in rural areas as competition emerges. Specifically, we believe that Congress sought to ensure that consumers in areas served by rural telephone companies continue to be adequately served should the incumbent telephone company seek to relinquish its ETC designation under section 214(e)(4). We therefore consider additional factors in the public interest examination required by section 214(e)(6) prior to the designation of an additional ETC in an area served by a rural telephone company, such as whether consumers will be harmed.²⁸

²⁶ 47 U.S.C. Sec. 254(f) provides that:

A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

.See, also, 47 U.S.C. Sec. 254(b)(5) ("There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.").

²⁷ *Qwest Corporation v. FCC*, 258 F3d 1191, (10th Cir. 2001) (FCC must ensure that sufficient state mechanisms exist to promote universal service).

²⁸ *Federal-State Joint Board on Universal Service*, __ FCC Rcd. __, 2002 FCC LEXIS 3368 (July 10, 2002), para. 4 (footnote omitted) (Guam Decision I); see, also, *Federal-State Joint Board on Universal Service; Guam Cellular* October 15, 2002

The public interest analysis requires information about the area, the rural carrier, the requesting carrier and the needs of the consumers and businesses. The effect of more competition on emergency services, incentives to invest, the ability to reach "critical mass" to support new services, as well as what price reductions and new supportable services the particular carrier requesting ETC designation has committed to implementing should all be considered. Until there is a carrier seeking support in Delta's area, all analysis is speculation and performe fruitless. As shown above, the decision cannot be predetermined by theorizing that competition is always beneficial. For example, the Utah commission was judicially sustained by the Utah Supreme Court in denying ETC status to an additional requesting carrier in a rural service area when the carrier had not promised any price reductions or new services to support its bare allegations of the benefits of competition.²⁹

B. Service Area Changes for Support, Service Obligation and Additional Designation Purposes Should Be Explored in the FCC's Upcoming Comprehensive Portability Proceeding

Just as Chairman Powell has expressed the need to rethink some earlier excesses in Commission pro-competitor policies (pp, 10-11, *supra*), Commissioner Martin has sounded his concerns that multiple ETC designations in rural areas require more rigorous examination:

...I have some concerns with the Commission's policy – adopted long before this Order – of using universal support as a means of creating “competition” in high cost areas. I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. This policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in a rural area, leading to inefficient and/or stranded investment and a

and Paging, Inc. d/b/a Guamcell Communications Petition for Designation as an Eligible Telecommunications Carrier In the Territory of Guam, 17 FCC Rcd 1502 (2002) (Guam Decision II). To answer whether customers will not be prejudiced when the incumbent withdraws, the evaluation should include whether the added ETC does not provide some of the required services under waiver.

²⁹ *WWC Holding Co., Inc. v. Public Service Commission of Utah*, paras. 9-24 (Utah Supreme Court . March 5, 2002), <http://courtlink.utcourts.gov/opinions/supopin/wwchol~1.htm>.

ballooning universal service fund. It is thus with real pause that I sign on to an Order that may further this policy.³⁰

Concurrence in the CPUC service area carve-up plan would have the sole purpose of "further[ing] this policy." Establishing the precedent here would likely spur aggressive advocacy of study area partitioning to help competitors secure more support for less universal service commitment.

Instead, the Commission should deny the CPUC petition, which does not satisfy the statute, the Commission's rules or sound public policy, and include issues about defining service areas for support eligibility and the geographic scope of each competitor's duty in the upcoming proceeding. The Commission now has experience with operating under existing rules and policies for additional ETC support, and it has recognized that a proceeding to review portability issues is necessary. These issues should be studied and resolved in that comprehensive context. The CPUC has sought here to "create competition" in rural areas where statutory rural area protections now bar it. Commissioner Martin has expressed grave concern about using support for this purpose.

His concerns are justified and timely. Others are actively raising and debating related issues before this Commission.³¹ Indeed, the Commission has deferred decisions on such related issues, stating that, "[a]s part of our continuing assessment of support to rural areas, we intend to initiate a proceeding in the future to examine further issues related to the application of

³⁰ See, e.g., *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers Federal-State Joint Board on Universal Service Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, 16 FCC Rcd 19613 (2001) (MAG Plan Order), Separate Statement of Commissioner Kevin J. Martin.

³¹ See, e.g., *National Telecommunications Cooperative Association Petition for Expedited Rulemaking*, filed July 26, 2002 (asking FCC to define "captured" and "new" subscriber lines for universal service support purposes).

the universal service mechanisms to competitive ETCs."

V. CONCLUSION

These comments have demonstrated that the CPUC's reasons for dividing Delta's study area into six service areas at the wire center level do not justify Commission concurrence. They rest on unsupported assumptions that Congress's sound and necessary rural area eligibility requirements are misguided, rather than facts and reasons for changing them; they do not comport with Joint Board recommendations and this Commission's rules and decisions; they prejudge or ignore significant public interest questions that must be evaluated case-by-case; and they raise additional issues that should be determined in the Commission's upcoming comprehensive portability proceeding. Accordingly, the Commission should deny the Petition and consider service area definition issues in its portability proceeding.

Respectfully submitted,

DELTA COUNTY TELE-COMM, INC.

By: /s/ Margot Smiley Humphrey

Margot Smiley Humphrey

Holland & Knight LLP
2099 Pennsylvania Avenue
Suite 100
Washington, DC 20006
(202) 955-3000

COLORADO TELEPHONE ASSOCIATION

By: /s/ Barry Hjort

Barry Hjort, Executive Vice President

Colorado Telecommunications Association
PO Box 300
Littleton, CO 80160
(303) 795-8080

I, Vicki Redman, of Holland & Knight LLP, 2099 Pennsylvania Ave., NW, Suite 100, Washington, DC 20006, do hereby certify that a copy of the Comments of Delta County Tele-Comm, Inc., was sent on this 15th day of October, 2002, via electronic mail or by first class mail, to the following parties:

Anthony Marquez, Esq.
Colorado Public Utilities Commission
1525 Sherman Street, 5th Floor
Denver, Colorado 89203

Bob Rowe
Commissioner
Montana Public Service Commission
1701 Prospect Avenue
P.O. Box 202601
Helena, MT 59620-2601

*Chairman Michael Powell
Federal Communications Commission
445 12th Street, SW, Room 8B201
Washington, D.C. 20554

Nanette G. Thompson,
Chair
Regulatory Commission of Alaska
1016 West Sixth Avenue, Suite 400
Anchorage, AK 99501-1693

*Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, SW, Room 8-A204
Washington D.C. 20554

Lila A. Jaber,
Commissioner
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399

*Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W., Room 8-C302
Washington, D.C. 20554

J. Thomas Dunleavy,
Commissioner
New York Public Service Commission
One Penn Plaza, 8th Floor
New York, NY 10119

*Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W., Room 8-A302
Washington, D.C. 20554

Greg Fogleman,
Economic Analyst
300 The Atrium, 1200 N. Street
P.O. Box 94927
Lincoln, NE 68509-4927

*William F. Caton, Acting Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, D.C. 20554

Larry Stevens
Utility Specialist
Iowa Utilities Board
350 Maple Street
Des Moines, IA 50319

Florida Public Service Commission
2540 Shumard Oak BLVD
Gerald Gunter Building
Tallahassee, FL 32399

Mary E. Newmeyer
Federal Affairs Advisor
Alabama Public Service Commission
100 N. Union Street, Suite 800
Montgomery, AL 36104

Joel Shifman
Maine Public Utilities Commission
242 State Street
State House Station 18
Augusta, ME 04333-0018

Peter Bluhm
Director of Policy Research
Vermont Public Service Board
Drawer 20
112 State Street, 4th Floor
Montpelier, VT 05620-2701

Charlie Bolle,
Policy Advisor
Nevada Public Utilities Commission
1150 E. Williams Street
Carson City, NV 89701-3105

Peter Pescosolido,
Chief, Telecom & Cable Division
State of Connecticut
Dept. of Public Utility Control
10 Franklin Square
New Britain, CT 06051

Jeff Pursley
Nebraska Public Service Commission
300 The Atrium, 1200 N. Street
P.O. Box 94927
Lincoln, NE 68509-4927

Carl Johnson
New York Public Service Commission
3 Empire State Plaza
Albany, NY 12223-1350

Lori Kenyon
Common Carrier Specialist
Regulatory Commission of Alaska
1016 West Sixth Avenue, Suite 400
Anchorage, AK 99501-1693

Nancy Zearfoss, Ph.D.,
Technical Advisor to Commissioners
Maryland Public Service Commission
6 St. Paul Street, 19th Floor
Baltimore, MD 21202-6806

Jennifer Gilmore,
Principal Telecommunications Analyst
Indiana Utility Regulatory Commission
Indiana Government Center South
302 West Washington Street, Suite E306
Indianapolis, ID 46204

Missouri Office of Public Counsel
301 West High Street, Suite 250
Truman Building
P.O. Box 7800
Jefferson City, MO 65102

Earl Poucher,
Legislative Analyst
Office of the Public Counsel
State of Florida
111 West Madison, Room 812
Tallahassee, FL 32399-1400

Brad Ramsay
NARUC
1101 Vermont AVE, N.W.
Suite 200
Washington, D.C. 20005

Michael Lee
Montana Public Service Commission
1701 Prospect Avenue
P.O. Box 202601
Helena, MT 59620-2601

Susan Stevens Miller
Maryland Public Service Commission
6 St. Paul Street, 16th Floor
Baltimore, MD 21202-6806

Tom Wilson
Washington Utilities & Transportation
Commission
1300 Evergreen Park Drive, S.W.
P.O. Box 47250
Olympia, WA 98504-7250

Philip McClelland
Commonwealth of Pennsylvania
Office of Consumer Advocate
555 Walnut Street
Forum Plaza, 5th Floor
Philadelphia, PA 19106

Barbara Meisenheimer
6 St. Paul Street, 19th Floor
Baltimore, MD 21202-6806

Diana Zake
Texas Public Utilities Commission
1701 N. Congress Avenue
Austin, TX 78711-3326

Tim Zakriski
State of New York
Dept. of Public Service
3 Empire State Plaza
Albany, NY 12223

Ann Dean
Maryland Public Service Commission
6 St. Paul Street, 16th Floor
Baltimore, MD 21202-6806

David Dowds
Public Utilities Supervisor
Florida Public Service Commission
2540 Shumard Oak BLVD
Gerald Gunter Building
Tallahassee, FL 32399-0850

Michele Farris
South Dakota Public Utilities Commission
State Capitol
500 East Capitol Street
Pierre, SD 57501-5070

Anthony Myers
Maryland Public Service Commission
CCB, Accounting Policy Division
445 12th Street, S.W., Room 5-A426
Washington, D.C. 20554

*Sharon Webber
Federal Communications Commission
CCB, Accounting Policy Division
445 12th Street, S.W., Room 5-A425
Washington, D.C. 20554

*Eric Einhorn
Federal Communications Commission
CCB, Accounting Policy Division
445 12th Street, S.W., Room 5-A425

*Anita Cheng
Federal Communications Commission
CCB, Accounting Policy Division
445 12th Street, S.W., Room 5-A445
Washington, D.C. 20554

*Matthew Brill
Federal Communications Commission
445 12th Street, S.W., Room 8-A204
Washington, D.C. 20554

*Samuel Feder
Federal Communications Commission
445 12th Street, S.W., Room 8-C302
Washington, D.C. 20554

*Jordan Goldstein
Federal Communications Commission
445 12th Street, S.W., Room 8-A302
Washington, D.C. 20554

*Carol Matthey
Federal Communications Commission
Common Carrier Bureau
445 12th Street, S.W., Room 5-C451
Washington, D.C. 20554

*Katherine Schroder
Federal Communications Commission
CCB, Accounting Policy Division
445 12th Street, S.W., Room 5-A426
Washington, D.C. 20554

*Dana Bradford
Federal Communications Commission
CCB, Accounting Policy Division
445 12th Street, S.W., Room 5-A314
Washington, D.C. 20554

*Bryan Clopton
Federal Communications Commission
CCB, Accounting Policy Division
445 12th Street, S.W., Room 5-A465
Washington, D.C. 20554

*Gene Fullano,
Federal Staff Chair
Federal Communications Commission
CCB, Accounting Policy Division
445 12th Street, S.W., Room 5-A623
Washington, D.C. 2055

*Katie King
Federal Communications Commission
CCB, Accounting Policy Division
445 12th Street, S.W., Room 5-B544
Washington, D.C. 20554

*William Scher
Federal Communications Commission
CCB, Accounting Policy Division
445 12th Street, S.W., Room 5-B550
Washington, D.C. 20554

*Qualex International
Portals II
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554

*Paul Garnett
Federal Communications Commission
CCB, Accounting Policy Division
445 12th Street, S.W., Room 5-A623
Washington, D.C. 20554

*Greg Guice
Federal Communications Commission
CCB, Accounting Policy Division
445 12th Street, S.W., Room 6-A232
Washington, D.C. 20554

*Geoffrey Waldau
Federal Communications Commission
CCB, Accounting Policy Division
445 12th Street, S.W., Room 5-B524
Washington, D.C. 20554

***Via hand delivery**

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Comments of Delta County Tele-Comm, Inc.

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